

**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**

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ADVISORY OPINION 2017-1

I. SUMMARY

Independent expenditures made by Super Political Action Committees do not create an appearance of a conflict of interest under the City's ethics laws. This is a matter of first impression.

II. ISSUE AND SHORT ANSWER

Do "independent expenditures" made by Super Political Action Committees ("Super PACs") for campaign purposes of a city officer create a conflict of interest under Revised Charter of Honolulu ("RCH") Sec. 11-102.1(a)?¹

No. Controlling legal authority provides that "independent expenditures" do not create an appearance of corruption because they are made without the coordination of a candidate or a candidate's campaign and are therefore too attenuated.

III. ANALYSIS

Assuming that an "independent expenditure" falls within the definition of a "gift"² for purposes of our Standards of Conduct, there is no conflict of interest because Super PACs make independent expenditures without the knowledge of the candidate.

¹ RCH § 11-102.1 provides:

No elected or appointed officer or employee shall: (a) Solicit or accept any gift, directly or indirectly, whether in the form of money, loan, gratuity, favor, service, thing or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence the officer or employee in the performance of such person's official duties. Nothing herein shall preclude the solicitation or acceptance of lawful contributions for election campaigns.

² The definition of "gift" is broadly worded: "Gift" means any gift, whether in the form of money, goods, service, loan, travel, entertainment, hospitality, thing, or promise or in any other form. Revised Ordinances of Honolulu ("ROH") § 3-8.7(a).

City officers and employees cannot solicit, accept,³ or receive,⁴ directly or indirectly, any gift under circumstances in which it can be reasonably inferred that the gift is intended: (1) To influence the solicitor or recipient in the performance of an official duty; or (2) as a reward for any official action on the solicitor's or recipient's part. RCH Sec. 11-102.1(a). *See also* Revised Ordinances of Honolulu ("ROH") Sec. 3-8.7;⁵ 3-8.8.⁶

Independent expenditure committees, also known as Super PACs are noncandidate committees that are registered and certified with the State of Hawaii Campaign Spending Commission and only make independent expenditures. Hawaii Revised Statutes ("HRS") Section 11-302.⁷ "Independent expenditures" are expenditures "expressly advocating the election or defeat of a clearly identified candidate that are not made in concert or cooperation with or at the request or suggestion of the candidate, the candidate committee, a party, or their agents." HRS Section 11-302.

As such, independent expenditures could not give rise to corruption or the appearance of corruption. *Yamada v. Weaver*, 872 F.Supp.2d 1023, 1040–41 (D. Hawai'i, 2012).

Although the government might still limit contributions made directly to candidates or parties, "the need for contribution limitations to combat corruption or the appearance

³ "Accept" is defined as: 1. An offeree's assent, either by express act or by implication from conduct, to the terms of an offer in a manner authorized or requested by the offeror so that a binding contract is formed. Black's Law Dictionary (10th ed. 2014).

⁴ "Receive" is defined as: 1. To take (something offered, given, sent, etc.); to come into possession of or get from some outside source. Black's Law Dictionary (10th ed. 2014).

⁵ ROH § 3-8.7(b) provides:

Neither the mayor, the prosecuting attorney, nor any appointed officer or employee shall solicit, accept, or receive, directly or indirectly, any gift under circumstances in which it can be reasonably inferred that the gift is intended: (1) To influence the solicitor or recipient in the performance of an official duty; or (2) As a reward for any official action on the solicitor's or recipient's part.

⁶ ROH § 3-8.8(a) provides:

No councilmember shall solicit, accept or receive, directly or indirectly, any gift, whether in the form of money, goods, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it can be reasonably inferred that the gift is intended to influence the councilmember in the performance of the councilmember's official duties or is intended as a reward for any official action on the councilmember's part.

⁷ HRS § 11-302 provides in pertinent part:

Noncandidate committee" means an organization, association, party, or individual that has the purpose of making or receiving contributions, making expenditures, or incurring financial obligations to influence the nomination for election, or the election, of any candidate to office, or for or against any question or issue on the ballot; provided that a noncandidate committee does not include: (1) A candidate committee; (2) Any individual making a contribution or making an expenditure of the individual's own funds or anything of value that the individual originally acquired for the individual's own use and not for the purpose of evading any provision of this part; or (3) Any organization that raises or expends funds for the sole purpose of producing and disseminating informational or educational communications that are not made to influence the outcome of an election, question, or issue on a ballot.

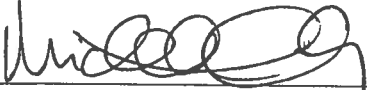
thereof tends to decrease as the link between the candidate and the regulated entity becomes more attenuated.” If the organization receiving contributions truly engages in only independent expenditures, the link is not only attenuated—it is broken. An anti-corruption or appearance of corruption rationale is nonexistent. It follows that contribution limitations to such organizations violate the First Amendment.

Yamada v. Kuramoto, 744 F.Supp.2d 1075, 1083 (D. Hawai‘i, 2010) (internal citations omitted). Unlike large campaign contributions, expenditures do “not presently appear to pose dangers of real or apparent corruption.” *Buckley v. Valeo*, 424 U.S. 1, 46 (1976); *see also*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (concluding that “independent expenditures ... do not give rise to corruption or the appearance of corruption.”).

“The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” *Buckley*, 424 U.S. at 47; *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 695 (9th Cir. 2010) (“[There is] no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption.”).

IV. CONCLUSION


Based on the foregoing, we conclude that independent expenditures do not give rise to corruption or the appearance of corruption because there is no prearrangement or coordination of expenditures with the candidate.



MICHAEL A. LILLY, Vice Chair
Honolulu Ethics Commission

DATED: February 17, 2017

APPROVED AS TO FORM AND LEGALITY:



JAN K. YAMANE
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Honolulu Ethics Commission

DATED: February 17, 2017